IN THE

Supreme Court of the United States

October Term, 1971

No. 70-295

FIRST NATIONAL CITY BANK,

Petitioner,

against

BANCO NACIONAL DE CUBA,

Respondent.

BRIEF IN OPPOSITION TO SECOND PETITION FOR CERTIORARI

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Questions Presented

1. Is this Court bound by the suggestion of the State Department that henceforth there shall be an exception to the act of state doctrine, to wit, that such doctrine need not be applied when it is raised to bar adjudication of a counterclaim when (a) the foreign state's claim arises from a relationship between the parties existing when the act of state occurred, (b) the amount of the relief to be granted is limited to the amount of the foreign state's claim, and (c) the foreign policy interests of the United States do not require application of the doctrine?

2. Is the act of state doctrine unavailable to the respondent in this case merely because it is pleaded as a defense to a counterclaim?

3. Does the Hickenlooper amendment, 22 U.S.C. §2370(e)(2), enacted to permit a court to pass upon

the validity of title to property expropriated by a foreign government when such property is marketed in the United States, apply to a counterclaim seeking compensation for the value of realty and intangible personalty nationalized by the Government of Cuba within its territory?

Respondent would answer all of the foregoing questions in the negative; if any of them is answered in the affirmative, one or more additional questions are presented, all raised in the Court of Appeals but not reached:

4. In an action brought by respondent against petitioner, is the Government of Cuba an "opposing party" within Rule 13(b) of the Federal Rules of Civil Procedure so as to permit petitioner to interpose a counterclaim against it?

5. Is respondent, a wholly owned instrumentality of the Government of Cuba, responsible for the debts of such Government?

6. Does the Hickenlooper amendment constitute an unconstitutional interference with the Judicial Branch in that it directs the Court to decide a question which this Court has already found to be nonjusticiable.

7. Both in terms of statutory interpretation and in terms of constitutionality, should the Hickenlooper amendment be given retroactive effect so that it is applicable to causes of action arising out of transactions completed prior to its enactment?

8. Did the Cuban Government violate international law when it nationalized the property of petitioner?

Statement

As the petitioner points out (Petition for Certiorari, p. 4), there is no dispute as to the facts.[1] However, the

[1] Except as to the precise relationship between respondent and the Government of Cuba. (See p. 14, *infra.*)

version of these facts, as set forth in the first opinion of the Court of Appeals (Pet. App. D, pp. D-2 to D-4) is less tendentious than petitioner's statement, and we are prepared to accept it as our own.

After the Court of Appeals had filed its first opinion, and after the petitioner had filed a petition for certiorari, the Solicitor General filed with this Court a letter from John R. Stevenson, Legal Adviser to the State Department, together with a suggestion that this Court remand the case to the Court of Appeals for reconsideration in view of that letter (Pet. App. C). This Court did so; on such reconsideration, the Court of Appeals affirmed its original opinion (Pet. App. A). The case is hence now before this Court on a second petition for certiorari. The Solicitor General has filed an amicus brief in support of this second petition, repeating and elaborating the suggestion made by Mr. Stevenson.

Reason for Denying the Writ

1. The Legal Adviser to the State Department has written to this Court suggesting that the act of state doctrine, as expounded by this Court in *Banco Nacional* v. *Sabbatino,* 376 U.S. 398 "need not be applied when it is raised to bar adjudication of a counterclaim or set-off when . . . the foreign policy interests of the United States do not require application of the doctrine". The letter goes on to say that in the instant case the foreign policy interests of the United States do not require application of the act of state doctrine to bar adjudication of the petitioner's counterclaim (Pet., App. C, pp. C-5, C-6). In a brief *amicus curiae,* subsequently filed by the Solicitor General, the Executive Branch goes further, alleging that in "the present class of cases" (i.e., counterclaims), the act of state doctrine "should not be applicable" (Amicus brief, pp. 2 and 3). Petitioner argues that this letter requires a reversal of the Court of Appeals' order.

A brief review of the various positions taken by the Executive Branch with respect to Cuban litigation may be helpful. The first relevant case was *Pons* v. *Republic of Cuba,* 294 F. 2d 925 (D.C. Cir. 1961). There Cuba sued to recover money belonging to it in the possession of the defendant. The defendant counterclaimed for the value of his property which, he alleged, had been confiscated by the Cuban Government. The Court of Appeals invited the Executive Branch to file briefs, but no briefs were filed, and the court held the act of state doctrine applicable to the counterclaim. Certiorari was denied, 368 U.S. 960.

The next case was *Rich* v. *Naviera Vacuba,* 197 F. Supp. 710 (E.D. Va. 1961) *aff'd* 295 F. 2d 24 (4th Cir. 1961). In an application for a stay pending a petition for certiorari, one of the libellants, United Fruit Company, raised issues concerning title to property nationalized by the Cuban Government. The Justice Department responded with a brief opposing the claim on act of state grounds, and the application for a stay was denied, September 14, 1961.[2]

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[2] One highly relevant fact does not appear in the opinions: on August 16, 1961, the day before the Bahia di Nipe sailed into United States waters. the Cuban Government had returned to the United States an Eastern Air Lines plane which had been hijacked three weeks prior (New York Times, August 17, 1961, p. 8, col. 6).

From the political point of view, the United States could hardly refuse to return the freighter and its cargo, in view of the fact that Cuba had just returned an airplane which had come into Cuban territory under comparable conditions.

The case was litigated with unusual speed in view of the nature of the sensitive questions of sovereign rights which were involved and the reported decisions inadequately present the issues that were actually litigated. As the files of this Court will show, the opinions of the lower courts were based on a claim of sovereign immunity, supported by the State Department. However, the United Fruit Company, one of the libellants, claimed to own the cargo on the basis of facts which were a replica of those in *Sabbatino,* and sought a stay pending certiorari on grounds similar to those argued by the District Court in *Banco Nacional de Cuba* v. *Sabbatino,* 193 F. Supp.

When the *Sabbatino* case reached this Court, the Court again invited the Executive Branch to file an amicus brief. It did so [3] and, in fact, argued orally in support of the act of state doctrine. After the *Sabbatino* case was decided, Senator Hickenlooper proposed an amendment to the then pending Foreign Aid Act, and in the hearings held on that Act the Executive Branch once again warmly supported the act of state doctrine and opposed the amendment.[4]

In the instant case, the Executive Branch has completely reversed its position. Although it purports to limit its present stand to cases involving counterclaims, the reasons urged are applicable to any kind of claim, and it is irrational to make the applicability *vel non* of the act of state doctrine depend on accidents of pleading.

The full implications of the present position of the Executive Branch are indeed grave. Although it now says that its policy with respect to foreign expropriations requires only a refusal to accept the act of state doctrine, the fact is that the purpose of the administration, "to protect United States investment abroad" (Amicus Brief, p. 2) can be met only by an ultimate adjudication on the law in favor of the petitioner. Thus, the Executive is now demanding that the Court abandon the act of state doctrine, but if the needs set forth in the amicus brief are to be

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375, which had been decided four and one-half months before the *Rich* litigation arose. In denying the application for a stay, this Court cited *Underhill* v. *Hernandez*, 168 U.S. 250, and *Ricaud* v. *American Metal Co.*, 246 U.S. 304. The position taken by the Justice Department in that case would support the position of the respondent here, but would not have been possible under the Hickenlooper amendment.

[3] That brief will be referred to hereinafter as the *Sabbatino* Amicus Brief.

[4] See, *infra*, footnote 6, p. 8.

served by the Judiciary the Executive must next demand a ruling on the merits in favor of the petitoner regardless of the state of the law. Abandonment of the act of state doctrine may place this Court in the very dilemma it sought to avoid in *Sabbatino*: It may have to choose between a decision in favor of petitioner, notwithstanding the law, in order "to protect United States investments abroad" or a decision that the Cuban expropriations were consistent with international law, thus defeating an important position of the Executive Branch on the subject of expropriations—a foreign policy position which extends far beyond the present controversy. This possibility is a very real one, since the question of law in this case is one that is by no means free from doubt, as this Court pointed out in *Sabbatino*, pp. 428, 429.

This is precisely what the Attorney General warned against in the *Sabbatino* Amicus Brief (p. 46) when he said that the rule now proposed by the Executive Branch "offers too much likelihood of embarrassment simply because of a miscalculation of the likely ruling of the judicial forum upon a question of international law."

Petitioner and the amicus curiae rely principally on *Bernstein* v. *N.V. Nederlandsche Amerikaansche, etc.*, 210 F. 2d 375 (2d Cir. 1954). We think the petitioner in error.

The *Bernstein* case arose out of unusual set of facts. See *Bernstein* v. *Van Heyghen Freres S.A.*, 163 F. 2d 246 (2d Cir. 1947), *cert. den.* 332 U.S. 772; *Bernstein* v. *N.V. Nederlandsche Amerikaansche, etc.*, 173 F. 2d 71 (2d Cir. 1949) and *Bernstein* v. *N.V. Nederlandsche Amerikaansche, etc., supra.* We respectfully submit it was one of those hard cases that made doubtful law. It was characterized by the Justice Department in 1963 as "an exceedingly narrow exception" to the act of state doctrine (*Sabbatino* Amicus Brief). The "Bernstein" exception has been applied only once in the history of the United States, in the *Bernstein* case itself, and was not considered by this Court

even on that single occasion. The Court of Appeals has cogently distinguished the *Bernstein* case, Pet. App. A, pp. A-5 to A-11.

The proposal now made by Mr. Stevenson was first made, in slightly different form by the Committee on International Law of the Association of the Bar of the City of New York in 1959, in a report entitled *A Reconsideration of the Act of State Doctrine in the United States Courts.*[5] It was there proposed that the act of state doctrine should be limited to those cases in which the Executive Branch expressly stipulates that it does not wish the court to pass upon the question of the validity of the act of a foreign sovereign. This proposal was discussed by the Supreme Court in *Sabbatino* on page 436, and was rejected for the reasons set forth in the Court's opinion. Those reasons were discussed at somewhat greater length in the *Sabbatino* Amicus Brief, at page 44:

> "Such a rule would . . . put an embarrassing burden upon the Executive. In the conduct of international relations, it may be of the utmost importance to preserve silence or at least to refrain from issuing official documents upon the legal status of the act of a foreign government. The proposed rule would compel the Executive either to issue a formal statement in advance of litigation whenever a foreign government had issued a decree that someone might claim affected the title to property within its jurisdiction in violation of international law, or else to keep track of court dockets all over the country lest a case that would embarrass the con-

[5] The present Legal Adviser to the State Department was then Chairman of the International Law Committee of the Bar Association. The same views were expressed by him in 1963 in 57 Amer. J. of Int. Law 97, entitled *The Sabbatino Case—Three Steps Forward and Two Steps Back,* a commentary on the Court of Appeals decision in the *Sabbatino* case. Mr. Stevenson was then a member of the Board of Editors of the American Journal of International Law. The view was again put forward before this Court in the *Sabbatino* case itself.

> duct of foreign relations go to judgment without the Executive's raising the bar. Even if this burden were eased by requiring notice to the Executive before the presumption of executive consent would be invoked, the Executive would still face the embarrassment of taking a position when silence would be wiser, or of announcing its position at a moment highly inopportune from the diplomatic standpoint in order to suit the convenience of private litigation."[6]

Mr. Stevenson's letter in this case modifies the proposal made by him eight years ago only in that he now limits it to cases where the act of state doctrine is advanced as the defense to a counterclaim. Neither Mr. Stevenson, in his letter, nor petitioner, have made any effort to answer what this Court said in the *Sabbatino* case, what the Executive Branch said in the *Sabbatino* Amicus Brief, or what the Attorney General said in his congressional testimony, Hearings before the Committee on Foreign Affairs, *supra,* at pages 1241, 1244 and *passim.*

The variety of positions taken by the Executive Branch on the subject of nationalization in the Cuban litigation alone is striking. Historically there has been a great deal of difference of opinion within the Executive Branch concerning the treatment of expropriation.[7] For example, the facts in the *Pons* case are the same as in the present case save that the party in office has changed. It is not unusual that different administrations should have different views on policy, but it is quite another thing to require

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[6] The same point was also made by the Executive Branch in its testimony before Congress when it was considering the Hickenlooper Amendment. See Hearings before Committee on Foreign Relations, United States Senate, 88th Cong., 2d Sess. on S. 2659, 2660, 2662 and H.R. 11380, pp. 618, 619; Hearings Before the Committee on Foreign Affairs, House of Representatives, 89th Cong., 1st Sess., on H.R. 7750, p. 1234.

[7] See, for example, New York Times, April 22, 1971, p. 11, col. 1.

the judiciary to follow every such change in policy, especially since some of them are quite sudden and unexpected. The result would be to turn the Court into an instrument of the foreign, or perhaps even the domestic, policies of the Administration. This is contrary to the principle of the separation of powers and inconsistent with the integrity of the Judicial Branch, which cannot and should not be placed in a position where its decisions on important questions of international law vary from time to time as one administration succeeds another.

2. Petitioner further argues, as it has consistently argued below, that the act of state doctrine is not applicable to any cases involving a counterclaim, so that quite regardless of Mr. Stevenson's letter and regardless of the Hickenlooper amendment (for which see below, pp. 10, 11), this Court's ruling in *Sabbatino* is not applicable here (Pet. p. 7).[8]

But every legal argument and every consideration of policy set forth by this court in *Sabbatino* is just as applicable to a counterclaim as to any other kind of claim. Nor (contrary to the views expressed by the United States in its amicus curiae brief at p. 3) is there anything in *National City Bank* v. *Republic of China*, 348 U.S. 356 which leads to any other result. That was an action by the Government of China to recover a sum of money on deposit with the defendant bank. The defendant interposed counterclaims arising out of the failure of the plaintiff to repay certain loans made to or guaranteed by it. Plaintiff moved to dismiss the counterclaim on grounds of sovereign immunity, thereby conceding, as a matter of pleading, that the counterclaims otherwise stated good causes of action. The District Court granted the motion, 108 F. Supp. 766

[8] This view has been developed much more fully in the past by the petitioner. See, for example, the first petition for certiorari in this case, pages 5-10, and petitioner's brief to the Court of Appeals on the first appeal, pages 17-20.

(S.D.N.Y. 1952); the Court of Appeals affirmed, 208 F. 2d 627 (2d Cir. 1953), and this Court reversed in a 5 to 3 decision, remanding the case to the District Court "with directions to reinstate the counterclaims", 348 U.S. at 366.

The words "act of state" or their equivalent do not appear in any of the briefs or the opinions written in the case, nor are any of the leading act of state cases cited. The plaintiff subsequently filed a reply to the counterclaim but did not allege that its failure to pay its debts was an act of state. In short, the concept that China's default may have been an "act of state" with *Sabbatino*-like consequences is totally missing from that litigation. "Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Webster* v. *Fall*, 266 U.S. 507, 511 (1925).

There is nothing to be gained by a discussion as to whether the defense of act of state would have been available to the Republic of China.[9] That case represents a much mooted point in the field of the enforcement of international claims and nothing warrants extending it to cover matters that were not before the Court and which were never considered by it. The case stands only for the principle that a plea of sovereign immunity is not available as a defense to a counterclaim.

In this case, respondent has *not* pleaded sovereign immunity. The whole issue is whether the counterclaim states a justiciable claim; *Sabbatino* teaches that it does not.

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[9] There may be some question as to whether a simple failure to meet a debt, unaccompanied by any specific act of repudiation, constitutes an Act of State within cases such as *Sabbatino, Oetjen* v. *Central Leather Co.*, 246 U.S. 297 (1918) and *Underhill* v. *Hernandez*, 168 U.S. 250 (1897). *Cf.* the treatment by the New York Court of Appeals of the second cause of action in *Holzer* v. *Deutsche Reichsbahn-Gesellschaft*, 277 N.Y. 474 (1938).

3. Both courts below assumed that petitioner's claim is barred by this Court's decision in the *Sabbatino* case unless it comes within the terms of 22 U.S.C. 2370(e)(2), generally referred to as the Hickenlooper amendment.[10] We think this is clearly so and that the Hickenlooper amendment does not apply.

The reasons for this conclusion are set forth in considerable detail by the Court of Appeals in its first opinion (Pet., pp. D-10 to D-23). An additional observation should be made:

In response to the comprehensive survey of the legislative history of the Hickenlooper amendment made by the Court of Appeals in its first opinion (App. D, pp. D-13 to D-18), the petitioner now calls attention for the first time to a letter by Professor Olmstead to the committee, which is reprinted in the petition for certiorari as Appendix G. That letter was written after Professor Olmstead had testified before the committee. It seems to have been written with this case in mind. It is, on its face, inconsistent with the testimony given by Professor Olmstead when he appeared in person before the committee and was questioned closely by its members. His original testimony is quoted by the Court of Appeals in its opinion, Apperdix D, pages D-15, D-16. It is the only element in the two year legislative history which petitioner cites in support of its position.

If certiorari is granted, and if any of the three propositions argued above be decided adversely to the respondent, several additional issues are raised, which were raised in the Court of Appeals but never reached.

4. The first of these (a contention which the court below found had "some justification," Pet. App. D, p. D-7) is that petitioner's claim should have been dismissed

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[10] The background of the Hickenlooper amendment is discussed fully in the District Court opinion in *Banco Nacional* v. *Farr*, 243 F. Supp. 957 (S.D.N.Y. 1965), aff'd 383 F. 2d 166 (2d Cir. 1967), cert. den. 390 U.S. 956.

because (a) the counterclaim was invalid procedurally in that it was directed against the Government of Cuba, which is not an "opposing party" under Rule 13 of the Federal Rules of Civil Procedure, or (b) assuming the counterclaim to be proper procedurally, respondent is not in fact liable for the obligations of the Government of Cuba or (c) at the very least this issue raised a triable issue of fact, Pet. App. D, pp. D-7 to D-8.

"Opposing parties", as used in Rule 13, means not only that the plaintiff must be the same person as the person cross-sued by the defendant, but that "the cause of action to be counterclaimed must be against . . . the same parties . . . in the same capacity." *Zion* v. *Sentry Safety Control Corp.,* 258 F. 2d 31 (3d Cir. 1958). See also *Erie Bank* v. *U. S. District Court,* 362 F. 2d 539 (10th Cir. 1966); *Cravatts* v. *Klozo Fastener Corp.,* 15 F.R.D. 12 (S.D. N.Y. 1953); *Pioche Mines Consol.* v. *Fidelity-Philadelphia Trust Co.,* 206 F. 2d 336, 337 (9th Cir. 1953), *cert. den.* 346 U.S. 899 (1953); *Higgins* v. *Shenango Pottery Co.,* 99 F. Supp. 522 (W.D. Pa. 1951); *Chambers* v. *Cameron,* 29 F. Supp. 742 (N.D. Ill. 1939).

Hence petitioner's counterclaim against the Government of Cuba cannot be pleaded in this action. Banco Nacional is not the same as the Government of Cuba, and even if it were, the claim against the petitioner is a claim brought by a bank in its capacity as bank, and a counterclaim cannot be brought against it as representative of the Government of Cuba. *United States ex rel. TVA* v. *Lacy,* 116 F. Supp. 15 (N.D. Ala. 1953) *rev'd on other grounds,* 216 F. 2d 223 (5th Cir. 1954); *United States* v. *Wissahickon Tool Works,* 84 F. Supp. 896, 901 (S.D.N.Y. 1949).[11]

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[11] In a *qui tam* action where the government sues on behalf of an individual (i.e. non-governmental informer, the same rules apply and a counterclaim may only be interposed against the true "opposing party". See *United States ex rel. Rodriguez* v. *Weekly Publications,* 74 F. Supp. 763, 768-69 (S.D.N.Y. 1947) for a discussion of how this determination of the real party is made for Rule 13 purposes.

See also *Epstein* v. *Shindler,* 26 F.R.D. 176 (S.D.N.Y. 1960); *First National Bank* v. *Johnson County National Bank & Trust Co.,* 331 F. 2d 325 (10th Cir. 1964); *Durham* v. *Bunn,* 85 F. Supp. 530 (E.D. Pa. 1949).[12]

It was Banco Nacional and not the Government of Cuba which instituted suit against the petitioner in the instant action.[13] Hence, Rule 13 would limit counterclaims to those against Banco Nacional *qua* bank; no counterclaims could lie against Banco Nacional *qua* Government.

Quite aside from the propriety of the counterclaim under rule 13, the cause of action alleged by the petitioner purports to be a claim against the Republic of Cuba and not against Banco Nacional. Therefore, Banco Nacional would not be liable even in an action brought directly against it, since a government owned corporation is not liable for the debts of the government.

Corporations similar in their organic structure to Banco Nacional exist not only in Cuba, but in almost every other country of the world. The United States has many, 31 U.S.C. § 8846. While we have not found any cases presenting precisely the issues which petitioner raises here (perhaps because no one has heretofore suggested that a

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[12] Rule 13 did not change Equity Rule 30 in any respect relevant to this issue (see Notes of Advisory Committee on Rules at 28 U.S.C.A., Note to Rule 13). *Southern Railway Co.* v. *Elliott,* 86 F. 2d 294 (4th Cir. 1936); *Federal Reserve Bank* v. *Early,* 30 F. 2d 198 (4th Cir. 1929); *aff'd* 281 U.S. 84 (1930); *Libby* v. *Hopkins,* 104 U.S. 303 (1881); *Sawyer* v. *Hoag,* 84 U.S. (17 Wall.) 610 (1873).

[13] This is, of course, the converse of the situation in *National City Bank of New York* v. *Republic of China, supra,* where it was the Republic which sued to collect money deposited in the defendant bank by one of its governmental agencies. Since it was the named party there, a counterclaim was permitted against it as the Republic of China under Rule 13, although no counterclaim would presumably have lain against its agency, the Shanghai-Nanking Railway Administration.

government-owned corporation is responsible for debts of the government), there are many analogous situations in which the separate corporate identity of such government-owned corporations has been recognized.

A corporation, even if an "instrumentality" of a foreign government, wholly owned and controlled by it, is still a separate entity. See *Keifer & Keifer* v. *Reconstruction Finance Corp.*, 306 U.S. 381 (1939); *Sloan Shipyards Corp.* v. *United States Shipping Board Emergency Fleet Corp.*, 258 U.S. 549 (1922). This conclusion has been reached even when, unlike the present situation, a foreign government has asserted the substantial identity of the government and the corporation. See, for example, *United States* v. *Deutsches Kalisyndikat Gesellschaft*, 31 F. 2d 199, 202 (S.D.N.Y. 1929).

A fortiori, the same conclusion must be reached here, where the foreign government asserts that as a matter of its own law, the corporation and the government are separate. At the very least such an assertion raises a question of fact. *United States of Mexico* v. *Schmuck*, 293 N.Y. 264 (1944); *Coale et al.* v. *Societe Co-Operative Suisse des Charbons*, 21 F. 2d 180 (S.D.N.Y. 1921); *Commercial Pacific Cable Co.* v. *Philippine National Bank*, 263 F. 218 (S.D.N.Y. 1920).

It has been argued that Banco Nacional has, on occasion (but *not* in this suit) pleaded sovereign immunity as a defense to a claim. Such pleas, where made, have been overruled on the precise ground that Banco Nacional is *not* the Government of Cuba, but is a separate entity engaging in non-governmental functions. *French* v. *Banco Nacional*, 23 N.Y. 2d 46 (1968). Further, immunity is not determined by the character of the corporation claiming it, but by the nature of the transaction. "Tate Letter", 26 State Dept. Bulletin 984. Hence the same entity might well be entitled to immunity in one lawsuit but not in another.

Should this Court accept petitioner's proposition the door would be left wide open for the creditors of any nation to proceed to litigation against the sovereign by issuing a summons against one of the sovereign's commercial corporations on the theory that the sovereign and its wholly owned corporation were identical. Such a principle would create anarchy in international trade, and its effect on our own government would be disastrous. It would make our government corporations, some of which operate in every corner of the world, subject to constant harassment.

5. If the Hickenlooper amendment is applicable, profound questions are raised with respect to the allocation of powers between the three branches of government. The statute invades the power of the Judiciary; it is, furthermore, unconstitutional as applied to the instant case since this action was pending at the time the amendment was enacted.

(a) From the earliest days of the Republic, the Judiciary has closely guarded its independence from either Executive or Legislative interference. *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792); *Den* v. *The Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1856); *Gordon* v. *United States*, 69 U.S. (2 Wall.) 561 (1865); *Keller* v. *Potomac Electric Power Co.*, 261 U.S. 428 (1923); *Postum Cereal* v. *California Fig Nut Co.*, 272 U.S. 693 (1927); *Federal Radio Commission* v. *General Electric Co.*, 281 U.S. 464 (1930). This Court has already decided in *Sabbatino* that the validity of the taking of property by a foreign sovereign government within its own territory is not a subject for judicial determination. Congress may not compel it to make such a determination.

In *Baker* v. *Carr*, 369 U.S. 186, 217 (1962), this Court set down the circumstances under which it would hold certain kinds of political questions to be nonjusticiable. Most of the elements discussed by this Court in that opinion

can be found in this record. This case involves foreign relations, an issue constitutionally committed to the Executive Branch, *Oetjen* v. *Central Leather Co.*, *supra*, at 309; *Baker* v. *Carr*, *supra*, at 246; *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936); there is "a lack of judicially discoverable and manageable standards for resolving it" (see *Sabbatino*, *supra*, at 428-430); the court cannot undertake "independent resolution [of the issue] without expressing lack of the respect due" the Executive Branch; there is "an unusual need for unquestioning adherence to a political decision already made" and there is a great "potentiality of embarrassment from multifarious pronouncements of various departments on one question." *Baker* v. *Carr*, *supra*, at 217.

The last few considerations deserve special attention, for the potentiality of embarrassment to the Executive Branch and the need for unquestioning judicial adherence to political decisions already made are nowhere better illustrated than in this case. The State Department has twice protested, through diplomatic channels, that the Cuban nationalizations violated international law. 43 Department of State Bull. 171, 316(1960). In terms of the need that our government should speak with a single voice in the area of foreign affairs, if the principle of *Sabbatino* were to be discarded a court would be placed in an intolerable position. It could not make a contrary decision without serious embarrassment to the Executive Branch and injury to the national interest.[14]

We do not argue that all "political questions" or even all "foreign relations questions" are nonjusticiable. *Baker* v. *Carr*, *supra*, at 211. But only a court can determine which political questions and which foreign relations questions are justiciable and it is not to take direction from any other branch of the Government on this issue. A determination of nonjusticiability, like a determination of

[14] See discussion pp. 5, 6 and footnote 2, p. 4, *supra*.

lack of jurisdiction, is an essential part of the exercise of judicial power. Questions such as these involve many delicate policy considerations arising out of the "court's appropriate place" within our governmental structure. *Rescue Army* v. *Municipal Court*, 331 U.S. 549, 568 (1947).

(b) A threshold question of statutory interpretation is presented as to whether the Hickenlooper amendment is applicable to litigation based on causes of action arising out of transactions completed before its passage. If it is, it is unconstitutional.

The statute itself contains no express language with respect to its retroactivity and there is a presumption that past transactions are excluded. *Claridge Apartments Co.* v. *Commissioner*, 323 U.S. 141, 164 (1944). See also *Davis* v. *Wechsler*, 263 U.S. 22, 25 (1923); *Hasset* v. *Welch*, 303 U.S. 303, 314 (1938); *Greene* v. *United States*, 376 U.S. 149, 160 (1964).

A statute ought to be interpreted so as to avoid constitutional questions when possible. The constitutional due process questions raised by a retroactive statute are difficult and such statutes have generally been held invalid. *Swayne and Hoyt* v. *United States*, 300 U.S. 297 (1937); *Lynch* v. *United States*, 292 U.S. 571 (1930); *Graham* v. *Goodcell*, 282 U.S. 409 (1931); *Forbes Pioneer Boat Line* v. *Board of Commissioners*, 258 U.S. 338 (1922).

6. The Hickenlooper amendment directs the court to decide cases coming within its terms "on the merits". The amendment, within the space of a single paragraph, makes three references to international law and it is therefore quite clear that if the statute is constitutional and applicable, the courts must apply substantive rules of international law to the Cuban nationalization of the property of petitioner.

The application of the Hickenlooper amendment to this case will therefore raise the precise issue which was raised in *Sabbatino*, but which the Court found it unnecessary

to decide, namely, the obligation of a sovereign to pay just compensation when it takes alien property. See 376 U.S. at 428-430. Our courts have always held, from *The Antelope*, 23 U.S. (10 Wheat.) 66 (1825) at 122, and *The Paquette Habana*, 175 U.S. 677 (1900) at 700, to *Sabbatino* at 427, 428, that international law is made by the practice of nations. There is no consensus among the nations of the world on the subject of the obligation of a nationalizing sovereign to pay just compensation.

Obviously we shall not in this brief review all of the cases on the subject. Many of them are discussed in the brief submitted by this respondent, as petitioner on the merits in the *Sabbatino* case and the Court is respectfully referred to pages 34 to 51 of that brief if it reaches this subject.[15]

Petitioner may rely on a single clause in the Hickenlooper amendment which refers to a confiscation "in violation of the principles of international law, including the principles of compensation and other standards set out in this subsection". See *Banco Nacional de Cuba* v. *First National City Bank of New York*, 270 F. Supp. 1004, 1008 (S.D.N.Y. 1967). This is presumably a reference to subd.

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[15] Most of the cases upon which petitioner will ultimately rely are from foreign jurisdictions. A note of caution in treating of such cases is in order. The matter was discussed with considerable insight and against the background of a lifetime of experience in this field by the late Harvey Reeves in *The Act of State Doctrine—Foreign Decisions Cited in the Sabbatino Case: A Rebuttal and Memorandum of Law*, 33 Fordham L. Rev. 599 (1966). For another post-*Sabbatino* discussion of the subject, see Friedmann, *National Courts and the International Legal Order; Projections on the Implications of the Sabbatino Case*, 34 George Washington L. Rev. 443 (1966); for a discussion of the lower court opinions in *Sabbatino*, see Falk, *Toward a Theory of the Participation of Domestic Courts in the International Legal Order: A Critique of Banco Nacionale de Cuba* v. *Sabbatino*, 16 Rutgers L. Rev. 1 (1961).

(1) of subsection (e) of 22 U.S.C. § 2370 which, if read literally, purports to be a Congressional enactment of international law.

But Congress cannot make international law. "As no nation can prescribe a rule for others, none can make a law of nations". *The Antelope, supra*, at 122. See also 1 Whiteman: Digest of International Law 1 (1963); *The Scotia*, 81 U.S. (14 Wall.) 170, 187 (1872). Congress may direct that municipal law may be applied in lieu of international law, but it did not make that direction here and in fact repeatedly directed the contrary. And the "principles of compensation" referred to in subdivision (1) bear no resemblance either to international law or practice. Dawson and Weston: "*Prompt, Adequate and Effective", a Universal Standard of Compensation?* 30 Fordham L. Rev. 727 (1962).

The Court must therefore interpret statutory language which is inherently inconsistent and contradictory. The crux of the difficulty lies within the language of § 2370(e)(1); that difficulty vanishes if the clause reading "equivalent to the full value thereof, as required by international law" is read as meaning "equivalent to the full value thereof *to the extent* required by international law". This reading will effectuate the evident intent of Congress that international law should be applied and yet will leave to the courts the determination of the requirements of international law, a usual judicial function.

5. There are two other "Questions Presented" by the petitioner which we think totally without foundation, but which should be mentioned for the sake of completeness.

The first Question Presented (Pet. p. 2) and the discussion relevant thereto (Pet. pp. 7-9) seems to proceed on the assumption that the order of this Court dated January 25, 1971, remanding the case to the Court of Appeals, was a direction to that court that it reverse its judgment of July 16, 1970, and make a different decision.

Thus it is argued that the majority of the Court of Appeals "failed to comply with the mandate of this Court" because it "persisted in its own conclusion that the act of state doctrine operates as a bar" (Pet. p. 8).

In its order remanding the case, this Court specifically stated that "In taking this action the Court is expressing no views on the merits of the case" (Pet. App. B). The merits were hence properly before the Court of Appeals, as the petitioner recognized when it briefed and argued the case before that court.

The fourth Question Presented suggests that a decision of the Foreign Claims Settlement Commission might be decisive of the issues on this petition (Pet. p. 3). It is hardly conceivable that this contention is put forward in good faith. The decision of the Commission on which petitioner now relies is dated November 14, 1969. This case was first argued in the Court of Appeals four months later, on March 23, 1970 but the Commission's decision was not relied on in that court nor was it even mentioned in its brief or argument. This failure to call to the attention of the court below a proceeding which it is now claimed has decisive effect on this litigation, can hardly have been an oversight.

The fact is, as petitioner knows full well, the argument has not even the shadow of merit. The Foreign Claims Settlement Commission is not an adjudicatory body and its rules do not even permit adversary proceedings. Respondent was not a party to those proceedings and did not even know that a claim had been filed, that it was under consideration or that it had been decided until the receipt of the first petition for certiorari in this case. There is no way under our law in which such an *ex parte* proceeding could be determinative of or even relevant to the rights of respondent.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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